

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MOHAMED JOHN AKHTAR and LA BUCA
RESTAURANT, INC. d/b/a SWING 46 JAZZ
AND SUPPER CLUB,

Plaintiff

-against-

ERIC ADAMS, Mayor of the City of New
York, ROHIT T. AGGARWALA, New York
City Department of Environmental Protection,
ERIC I. EISENBERG and JOHN AND JANE
DOES ONE THROUGH THIRTY,

Defendants

23-CV-6585 (JGLC)(VF)

**REPLY DECLARATION OF ERIC EISENBERG IN SUPPORT OF HIS MOTION TO
DISMISS PURSUANT TO RULES 12(B)(1), 12(B)(2), 12(B)(4), 12(B)(5) AND 12(B)(6)**

1. The undersigned, Eric Eisenberg,¹ respectfully submits this declaration in further support of his motion to dismiss all claims which may be asserted against him.
2. Attached hereto as Exhibit 1 is a true and correct copy of documents provided to me by the Office of Administrative Trials and Hearings (“OATH”) on January 17, 2024 in response to a FOIL Request seeking “All communications between OATH and Anthony Iannarelli (or Anthony Iannarelli, Jr.) on or after June 1, 2023”; these documents, which are alternately available for PDF download at <https://a860-openrecords.nyc.gov/response/3318709?token=7fbc48706a72415685abb24f5c246a86>, include a June 2, 2023 response by OATH to Mr. Iannarelli’s May 12, 2023 correspondence to OATH, amongst other correspondence, giving Mr. Iannarelli simple instructions for how to participate in a July 12, 2023 remote hearing. As can be seen in Exhibit 1, Mr. Iannarelli failed or refused to follow those instructions, because he failed to email OATH at RemoteManhattan@oath.nyc.gov a week before the July 12, 2023 hearing date.
3. Attached hereto as Exhibit 2 are true and correct printouts, prepared January 22, 2024, of documents obtained via OATH’s website at <http://a820-ecbticketfinder.nyc.gov/searchHome.action> pertaining to OATH-returnable New York Fire Department-issued Summons 014069161M having as the respondent “LA BUCA RESTAURANT INC DBA SWING 46”, demonstrating that Plaintiffs have successfully obtained a new, future hearing date of May 1, 2024 after having defaulted on this (non-noise) OATH-returnable summons.
4. Attached as Exhibit 3 is a true and correct printout, prepared January 22, 2024, of OpenData records obtained from <https://data.cityofnewyork.us/City-Government/OATH-Hearings-Division->

¹ The undersigned does not have the middle initial “I”, unlike the Eric I. Eisenberg of West 54th or 55th Street in Manhattan identified in the Complaint (D.I. 1) and/or in the Summonses (see D.I. 20 and 23) issued in this case.

[Case-Status/jz4z-kudi/data](#) and titled "OATH Hearings Division Case Status," indicating (at the very end of the document) the existence of at least 19,466,689 summonses returnable to the OATH Hearings Division.

5. I have never appointed anyone at the Chrysler Building or any residential apartment building as my agent for service of process. To the best of my recollection and knowledge, I have never appointed anyone at all as my agent for service process.
6. I have never provided instructions to anyone to evade or assist with evading service of process.
7. True and correct copies of videos recorded by the undersigned after the filing of the Complaint in this action, during at least a portion of which recordings the undersigned heard audible music on the public sidewalk coming from Plaintiffs' Swing 46 establishment, are available at <https://photos.app.goo.gl/FxkNbWYLomdYAGft6> and <https://photos.app.goo.gl/j19WrUojXzEMBnef6>; the former video shows, *inter alia*, music audibly playing to the public sidewalk from the Swing 46 establishment and Plaintiff John Akhtar physically hitting my hand and/or phone with his cell phone, while the latter video shows, *inter alia*, me fleeing across West 46th Street due to Plaintiff John Akhtar's behavior, followed by Mr. Akhtar throwing a dog down stairs into a metal table or chairs, in what I believe to be a further attempt to intimidate me.
8. I also located a video on YouTube, currently available at <https://www.youtube.com/watch?v=-bKCzySi5qo>, showing Sarah Hayes and her band, on what I recognize to be Swing 46's patio, playing amplified music directed, e.g. via one or more speakers, to the public sidewalk just past Swing 46's patio.
9. I have never touched a cell phone or other recording device to a speaker or window of the Swing 46 establishment.

10. I have reviewed a grainy black-and-white image attached to Mr. Akhtar's declaration, showing the back of a person standing on the sidewalk a few feet away from a corner business, and am certain that the business shown is not Swing 46, which is a mid-block business with a patio; I am concerned that following and taking and presenting an image taken from behind the person at a non-Swing 46 location is a further attempt by Mr. Akhtar and/or Mr. Iannarelli at intimidation.
11. Attached as Exhibit 4 is a copy of *Lombardo v. 333 East 49th Partnership, LP*, 2022 NY Slip Op 30665(U), Docket No. 160424/2020 (N.Y. Sup. Ct. March 3, 2022).
12. I also located a video provided to DEP, recorded at approximately 7:05 PM on October 11, 2022, entirely from the advertising board-laden sidewalk in front of the Swing 46 establishment. Music from Swing 46 is clearly audible on the public sidewalk where other advertising indicia of Swing 46 had been placed, from where the video was taken. This advertising indicia placed on the public sidewalk in front of Swing 46 included a sign promoting both the "ABSOLUT" alcohol brand and also "Jazz". I have made a true and correct copy of this video available at <https://photos.app.goo.gl/JY3dS2RrRuRvmVTM7>
13. I reviewed public OATH Opendata records, and determined that fourteen summonses were issued in the general neighborhood of Swing 46 (including three on the very same "Restaurant Row" block of West 46th Street between 8th Avenue and 9th Avenue) pertaining to alleged violations occurring on October 11, 2022 of Section 24-244(b) of the Noise Code by businesses other than Swing 46, summarized as follows:

| OATH Summons Number | Respondent | Respondent Address (Manhattan) |
|---------------------|---------------------------------------|-----------------------------------|
| 000285275Z | APPLEBEE'S | 205 WEST 50 STREET |
| 000285251Y | BARDOUGH | 350 WEST 46 STREET |
| 0216392395 | CDDF RESTAURANT INC DBA TITO MURPHY'S | 346 WEST 46 STREET |

| | | |
|------------|--------------------------------|--------------------|
| 000285255L | DARK SIDE OF THE MOO | 339 WEST 44 STREET |
| 0216392377 | EZ PAELLA | 744 9 AVENUE |
| 0216392404 | HARD ROCK CAFE | 1501 BROADWAY |
| 0216392469 | INTERCONTINENTAL | 300 WEST 44 STREET |
| 0216392450 | JUNIOR'S | 1515 BROADWAY |
| 0216392413 | LE RIVAGE | 340 WEST 46 STREET |
| 000285252X | MARQUIS THEATRE | 210 WEST 46 STREET |
| 000285253H | O'DONOGHUE'S BAR | 156 WEST 44 STREET |
| 0216392431 | PELE SOCCER | 1560 BROADWAY |
| 0216392440 | RENAISSANCE HOTEL | 714 7 AVENUE |
| 0216392422 | VIRGIL'S REAL BBQ TIMES SQUARE | 152 WEST 44 STREET |

14. Based on public records of OATH, true and correct copies of which are attached as Exhibit 5, some of these respondents appeared at OATH to contest the violations or otherwise participated in OATH proceedings. APPLEBEE'S appeared at a July 31, 2023 hearing as to its DEP-issued summons, and was found in violation. BARDOUGH appeared at a October 3, 2023 hearing as to its DEP-issued summons, and was found in violation. EZ PAELLA defaulted on its summons, but had its default reopened and now has a hearing date of November 18, 2024. MARQUIS THEATRE appeared at a June 14, 2023 hearing as to its DEP-issued summons, and was found in violation. O'DONOGHUE'S BAR appeared at a July 18, 2023 hearing as to its DEP-issued summons, and was found in violation. RENAISSANCE HOTEL appeared at an April 2, 2024 hearing as to its citizen-issued (referred to as "MISCELLANEOUS AGENCIES") summons, and was found in violation.
15. Again based on public records of OATH, true and correct copies of which are attached as Exhibit 6, there are also examples of businesses appearing before OATH and successfully having their 244(b) noise summonses dismissed. By way of very limited example, the CHURCH OF SCIENTOLOGY OF NY had a DEP-issued summons dismissed after a June 28, 2023 hearing, and BOWLERO TIMES SQUARE, a bowling alley, had a citizen-issued summons dismissed after a February 12, 2024 hearing.

16. Attached as Exhibit 7 are true and correct records of OATH, confirming that Plaintiff LA BUCA RESTAURANT, INC., through a registered representative or directly via Plaintiff Akhtar, has successfully appeared at several OATH proceedings in connection with summonses issued by New York City against LA BUCA RESTAURANT, INC., successfully obtaining either a dismissal or reduced (“mitigated”) penalties.

I declare under penalty of perjury that the foregoing is true and correct.

Dated/Executed: Miami, Florida
April 22, 2024

Respectfully submitted,

s/ Eric Eisenberg
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